81-1863

No.

Supreme Court, U.S.
FILED
APR 7 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

MARY T. GRACE, ET AL.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether 40 U.S.C. 13k, which prohibits picketing, leafleting, and demonstrating in the Supreme Court building and on its grounds, violates the First Amendment.

PARTIES TO THE PROCEEDING

In addition to the United States, the appellants are Alfred Wong, Marshal of the Supreme Court of the United States; James Zagami, Chief, Supreme Court Police; and John H. Drexhagen, Officer, Supreme Court Police. The appellees are Mary Terese Grace and Thaddeus Zywicki. The Chief Justice was named as a defendant in the district court and as an appellee in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-49a) is reported at 665 F.2d 1193. The opinion of the district court (App. D, *infra*, 56a-68a) is reported at 524 F. Supp. 815.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 50a-51a) was entered on September 8, 1981, and a petition for rehearing was denied on November 12, 1981 (App. C, infra, 52a). A notice of appeal (App. E, *infra*, 70a) was filed on December 11, 1981. On February 2, 1982, Justice Brennan extended the time for docketing the appeal to and including April 9, 1982. The jurisdiction of this Court is invoked

under 28 U.S.C. 1252. *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974).

STATUTORY PROVISION INVOLVED

40 U.S.C. 13k provides:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

STATEMENT

40 U.S.C. 13k prohibits the "display [of] * * * any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" in the Supreme Court building or on its grounds.[1] The Marshal of the Supreme Court, who supervises the Supreme Court police in their enforcement of Section 13k (see 40 U.S.C. 13n), interprets it to prohibit all picketing, leafleting, and demonstrating (App. A, *infra*, 6a-7a n.7).

On three occasions between May 1978 and February 1980, appellee Zywicki stood on the Supreme Court grounds and attempted to distribute leaflets. One leaflet concerned the removal of unfit federal judges; the others discussed Central American politics (App. A, *infra*, 3a-4a; App. D, *infra*, 57a-58a). Each time, an officer of the Supreme Court Police advised Zywicki that his conduct was prohibited, and he left the Supreme Court grounds. Appellee Grace learned of these events, and in March 1980 she stood

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[1] The Supreme Court grounds extend to the curb on each side of the square block on which the Court is situated. 40 U.S.C. 13p.

on the Supreme Court grounds with a sign, approximately four feet by two and one-half feet, that recited the words of the First Amendment. She, too, left the grounds after receiving a warning from a Supreme Court Police officer (App. A, *infra*, 4a; App. D, *infra*, 56a-57a). Two months later, appellees brought this action in the United States District Court for the District of Columbia, seeking a declaration that Section 13k is unconstitutional on its face and an injunction against its enforcement (App. A, *infra*, 4a).

The district court dismissed appellees' complaint,[2] but a divided court of appeals reversed and held Section 13k unconstitutional on its face (App. A, *infra*, 30a). The court first ruled that "whenever the Government denies freedom of expression on property generally open to the public, the restriction must be justified by a significant governmental interest—whether that interest derives from the very nature of the property itself, or from some other source" (*id.* at 19a). The court acknowledged that "[s]ubstantial governmental interests certainly * * * justify restrictions on picketing and other forms of expression in and near courthouses" (*id.* at 20a). It noted the need to protect against "influence or domination of the judiciary by public pressure," because "arguments to courts properly are presented in official pleadings * * * not on placards" (*id.* at 21a). Moreover, the court said, Congress may protect against the danger that the public will mistakenly believe a judge's decision to have been the result of popular pressure (*ibid.*).

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[2] The district court ruled that appellees had not exhausted their administrative remedies (App. D, *infra*, 65a-68a). The government did not suggest this basis for decision to the district court and did not defend it in the court of appeals.

Nevertheless, the court of appeals declared that it "need not determine the extent to which these concerns are applicable to proceedings before the United States Supreme Court" because "these legitimate concerns are fully addressed by 18 U.S.C. 1507" (App. A, *infra*, 21a-22a). Section 1507 provides:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

The court noted (App. A, *infra*, 23a) that the constitutionality of a state statute modeled after the bill that became Section 1507 was upheld in *Cox* v. *Louisiana* (*Cox II*), 379 U.S. 559, 560-567 (1965). Because of Section 1507, the court of appeals said, it could find no justification for 40 U.S.C. 13k.

The court of appeals dismissed the argument that the need to protect the dignity and decorum of the Supreme Court justified Section 13k. The court questioned whether these interests could ever justify a regulation of expression (App. A, *infra*, 24a). The court then added that because "*all* expressive conduct outside the Supreme Court" could not be shown "adversely [to] affect the peace and decorum of the Court," the government's interest in promoting those objectives was not sufficient to sustain Section 13k (App. A, *infra*, 25a).

The court of appeals stated that it did not intend to "suggest that any individual may picket or leaflet in the Supreme Court building itself" (App. A, *infra*, 26a-27a). But it said that because of the "all-encompassing terms," the "decades of consistently broad enforcement," and the "slim legislative history" of Section 13k, it would not construe the statute more narrowly in order to avoid constitutional objections (App. A, *infra*, 28a-29a). The court concluded that because Section 13k "prohibits expressive conduct unrelated to any business of the Supreme Court throughout the Supreme Court grounds," it is "void on its face" (App. A, *infra*, 27a).

Judge MacKinnon dissented from this holding. He reasoned that the activities proscribed by Section 13k would, if permitted, "create the impression * * * in the public's mind that the Supreme Court is embroiled in or affected by such street pressures and picketing. Our tripartite government has a strong interest in sheltering its judicial branch from the appearance of influence by political forces and all outside pressures" (App. A, *infra*, 32a). Judge MacKinnon also questioned the majority's suggestion that the restriction imposed by Section 13k is excessive because it extends beyond matters pending before the Court, noting that "the subject[s] of on-going public campaigns and movements" are frequently "potential judicial issues" that are likely to come before the Court at some time (App. A, *infra*, 47a).

Three judges dissented from the court of appeals' denial of a petition for rehearing with a suggestion for rehearing en banc (App. C, *infra*, 53a-55a).

THE QUESTION IS SUBSTANTIAL

The First Amendment permits a content-neutral regulation that leaves open alternative means of expression and promotes substantial government interests. The narrow restriction imposed by 40 U.S.C. 13k is not based on the content of expression. In addition, Section 13k leaves open ample alternative means for appellees and others to express themselves; it permits demonstrations and leafleting directly across the street from the Court, a location that should be significantly less satisfactory only to those who are attempting to influence the Court—and who therefore, under *Cox II*, *supra*, have no right whatever to be near it. Finally, the court of appeals acknowledged the government's important interest in protecting against actions that might create the impression that the Supreme Court can be swayed by outpourings of popular sentiment.

Nevertheless, the court invalidated Section 13k because it assumed, incorrectly and without analysis, that the government's interest is fully protected by 18 U.S.C. 1507, a statute that prohibits only actions done with the intent of influencing the Court. Moreover, the court of appeals erred in denigrating the government's interest in preserving certain sites, such as the Supreme Court, as national monuments that serve purposes "basically incompatible with" the "manner of expression" in which appellees propose to engage (*Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972)). Because the court of appeals incorrectly reevaluated Congress' legitimate objectives and the efficacy of the means Congress chose to attain them, thus needlessly striking down an Act of Congress that imposes at most a slight restriction on expression, plenary review by this Court is warranted.

1. The Court has "'often approved restrictions [on expressive activities] * * * that * * * are justified without reference to the content of the regulated speech, that * * * serve a significant governmental interest, and that in doing so * * * leave open ample alternative channels for communication * * *.'" *Heffron* v. *International Society for Krishna Consciousness, Inc.*, No. 80-795 (June 22, 1981), slip op. 6-7, quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). See, *e.g.*, *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 535 (1980); *Grayned* v. *City of Rockford*, *supra*. It is clear that Section 13k is a neutral regulation "'applicable to all speech *irrespective of content*'" (*Carey* v. *Brown*, 447 U.S. 455, 470 (1980), quoting and adding emphasis to *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975)). Section 13k bars all demonstrating and leafleting on the Supreme Court grounds, whatever the speaker's message. The Marshal of the Supreme Court stated in an affidavit filed in the district court that Section 13k "is enforced uniformly without regard to [the] message of the expressive conduct." Neither the district court nor the court of appeals found any evidence of discriminatory enforcement. Section 13k therefore presents no danger that "communication has * * * been prohibited 'merely because public officials disapprove the speaker's views.'" *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 536, quoting *Niemotko* v. *Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

Moreover, Section 13k does not impose a significant burden on protected speech. Section 13k permits speakers to demonstrate anywhere in the vicinity of the Supreme Court except on the one square block

occupied by the Court itself, and in the Court building. Section 13k does not apply, for example, to leafleting and picketing across the street from the Court. The court of appeals assumed (see App. A, *infra*, 24a)—although appellees did not show—that speakers attract less attention across the street than they would on the Supreme Court grounds. But especially when a speaker is addressing a subject unrelated to the Court's business, there is no reason to believe that any diminution in the attention he receives by moving across the street is of constitutional significance. See *United States Postal Service* v. *Council of Greenburgh Civic Associations*, No. 80-608 (June 25, 1981), slip op. 3 (Brennan, J., concurring). In any event, the Court has made it clear that if the government imposes a content-neutral regulation on speech, the First Amendment requires only that it leave open "ample" alternative means of communication. A speaker has no absolute right to speak at the time or place, or in the manner, that attracts the largest audience or the most attention. See, *e.g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, *supra*, slip op. 13-14; *Greer* v. *Spock*, 424 U.S. 828, 836 (1976), quoting *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966); *Cox* v. *Louisiana* (*Cox I*), 379 U.S. 536, 554-555 (1965).

A speaker who is demonstrating in an attempt to influence the Court may have a strong interest in being as close to the Court as possible. See *Carey* v. *Brown*, *supra*, 447 U.S. at 468-469 n.13. But as the court of appeals recognized, this interest does not merit constitutional protection, and 18 U.S.C. 1507 constitutionally prohibits such a speaker from being near the Court. *Cox II*, *supra*, 379 U.S. at 560-567. Other speakers who are not addressing the Court may consider its grounds the most appropriate symbolic

backdrop for their activities. Even from across the street, however, demonstrators will be able to take advantage of the connotations of proximity to the Court. Thus the court of appeals, while acknowledging that those with the strongest interest in demonstrating on the Supreme Court grounds may not do so, invalidated Section 13k in order to protect those who are not directly petitioning the Court, and whose only interest is in the somewhat greater attention they may attract, or in having a marginally more appropriate site for their demonstration. This is not a sufficient basis for striking down an Act of Congress. See *United States Postal Service* v. *Council of Greenburgh Civic Associations*, *supra*; *Adderley* v. *Florida*, *supra*.

2.a. The court of appeals acknowledged (App. A, *infra*, 20a-21a) that the government has unusually strong interests in regulating picketing and demonstrations near federal courts. Congress has an interest, first, in "protecting [the] judicial system from the pressures which picketing near a courthouse might create. * * * [A] legislature has the right to recognize the danger that some judges * * * and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms * * *." *Cox II*, *supra*, 379 U.S. at 562-565. Perhaps even more important, so far as Section 13k is concerned, is the government's interest in "protect[ing] the judicial process from being misjudged in the minds of the public" (*id.* at 565). A decision rendered shortly after a large and well-publicized demonstration on the issue involved may be perceived as a reaction to the demonstration; Congress "may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of

the judicial process" (*ibid.*). See *Greer* v. *Spock*, *supra*, 424 U.S. at 839 (government's interest in protecting against the appearance that the military is involved in politics justifies a restriction on expressive activities); *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 565 (1973) (interest in avoiding the appearance that government employees are influenced by politics justifies a restriction on expressive activities).

The court of appeals did not deny that Section 13k promotes these substantial interests. Rather, the court struck down Section 13k because, it asserted (App. A, *infra*, 22a), these interests were "fully addressed" by 18 U.S.C. 1507. Since the Constitution does not prohibit Congress from enacting two statutes that address the same problem in overlapping ways, the court of appeals must have meant that Section 13k was excessively restrictive because it, unlike Section 1507, was not limited to actions done "with the intent of influencing" the Court (see App. A, *infra*, 23a). But the court did not undertake to weigh the advantages and disadvantages of a specific intent requirement and did not adequately explain why Section 13k must be invalidated because it does not include such a requirement.

The intent requirement in Section 1507 is principally designed to protect such expression as "picketing to protest the actions of a[n] * * * official * * * completely unrelated to any judicial proceedings, who just happen[s] to have an office located in the courthouse building" (*Cox II*, *supra*, 379 U.S. at 567). Section 13k, however, applies only to the Supreme Court building, which houses only the Court and related offices. Thus the principal reason for an in-

tent requirement is simply inapplicable to Section 13k. The court of appeals also suggested that the "intent of influencing" requirement is needed so that Section 13k will not restrict demonstrations that are wholly unrelated to the Court's business, and that therefore do not implicate Congress' interest in preventing the real or perceived intimidation of the judiciary. But such demonstrations are likely to be relatively few in number, both because the Court deals with a wide range of issues of public importance and because those interested in demonstrating about matters unrelated to the Court's work are more likely to choose other sites in Washington. In addition, as we have said, persons involved in demonstrations not addressed to the Court's work have less of an interest in being on the Supreme Court grounds, and asking them to move across the street does not have a significant impact on their First Amendment rights.

At the same time, limiting Section 13k to demonstrations intended to influence the Court would have significant costs. It would inevitably increase the discretion of enforcement officers and juries, and would permit the content of a person's speech to be used against him, as evidence of his intentions (see *Cox II*, *supra*, 379 U.S. at 567); these consequences are surely undesirable, even though *Cox II* establishes that they do not make Section 1507 unconstitutional. Moreover, some demonstrations concerned with a political or social issue implicated by Supreme Court cases may be *seen* as influencing the Court—and therefore, under *Cox II*, are properly subject to regulation—even though it cannot be shown that the demonstrators *intended* to influence the Court. The court of appeals did not explain why, given this balance

of opposing interests, Congress violated the Constitution by not limiting Section 13k to demonstrations intended to influence the Court.

b. The government also has a substantial interest —not seriously considered by the court of appeals— in dedicating some of its property to symbolic uses inconsistent with public demonstrations. There can be no doubt of the government's power to establish monuments and memorials; similarly, public buildings and grounds can (and frequently do) serve symbolic, as well as practical, functions. The court of appeals failed to explain why Congress cannot treat the building and grounds of the nation's highest court as a symbol of the characteristic virtues of the judicial process—calm deliberation and reflection, free from outside pressure and political controversy —and to determine that this symbolic mission is "basically incompatible with" public demonstrations (*Grayned* v. *City of Rockford, supra,* 408 U.S. at 116).[3]

It is well established that Congress or a state legislature may dedicate property to uses that do not permit expression of a certain form, or even a certain content. See, *e.g., Jones* v. *North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119 (1977) (prisons); *Greer* v. *Spock, supra* (military bases); *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974) (public transportation); *Grayned* v. *City of Rockford, supra,* 408 U.S. at 116 (libraries); *id.* at 117-121 (schools); *Adderley* v. *Florida, supra* (jail grounds). See also *United States Postal Service* v.

[3] The court of appeals repeatedly referred to Section 13k as a "total ban" on expression, which of course it is not; it does not, for example, prohibit private discussions among persons properly on the Court grounds.

Council of Greenburgh Civic Associations, supra, slip op. 14-19; *Heffron* v. *International Society for Krishna Consciousness, Inc., supra*, slip op. 6-10. In these cases, the government's interests in regulating expression were arguably more tangible than Congress' interest in preserving the symbolic value of certain public areas and buildings; but just as esthetic interests can justify restrictions on speech (*Metromedia, Inc.* v. *City of San Diego*, No. 80-195 (July 2, 1981), slip op. 16, 18 (plurality opinion)), there can be little doubt that Congress may make the "necessarily subjective" (*id.* at 18) judgment that in order to serve symbolic and other intangible public purposes, certain monuments and areas require a serenity and decorum that cannot accommodate public demonstrations.[4]

There is no reason to deny Congess the power to treat the nation's highest court in this fashion. A different question would be presented if Congress used its power to preserve symbols and create monuments in such a way that First Amendment rights were seriously impaired; but as we have explained, Section 13k constitutes, at most, a minimal restriction on expression. Similarly, *Cox II, supra*, establishes that, for First Amendment purposes, courthouse grounds are not comparable to areas like "streets and parks[,] * * * [which] immemorially * * * have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (*Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)), and where the government's power to limit expression is therefore more

[4] It seems unlikely, for example, that the Constitution requires Congress to permit demonstrations in national cemeteries.

circumscribed (see, *e.g.*, *Carey* v. *Brown*, *supra*, 447 U.S. at 460; *Hudgens* v. *NLRB*, 424 U.S. 507, 515 (1976); see also *A Quaker Action Group* v. *Morton*, 516 F.2d 717, 725 (D.C. Cir. 1975) (White House area is a "unique situs" for the exercise of First Amendment rights)). Indeed, the Supreme Court building and grounds are a uniquely appropriate symbol of the "calmness and solemnity of the courtroom" and of the judicial process (*Cox II*, *supra*, 379 U.S. at 583 (opinion of Black, J.)). See *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575, 584 (D.D.C.) (three-judge court), aff'd, 409 U.S. 972 (1972) (demonstrations on Capitol grounds are permissible although similar demonstrations near a courthouse are not, because Congress, unlike a court, is appropriately subject to public opinion). The court of appeals did not adequately consider this significant legitimate interest promoted by Section 13k.

3. Because this case concerns the constitutionality of a statute that applies only to the Supreme Court building and grounds, and is enforced by an officer appointed by the Court, the question arises whether the members of this Court are disqualified from considering the matter. Although the situation of the Chief Justice may present special concerns because he was named as a party in the proceedings below, we know of no sufficient reason for the other members of the Court to disqualify themselves, either under the mandatory criteria of 28 U.S.C. 455(b) or because their "impartiality might reasonably be questioned" (28 U.S.C. 455(a)). In addition, if all the members of the Court are disqualified, the judgment below—which declared an act of Congress unconstitutional on its face—apparently must be affirmed.

28 U.S.C. 2109; see *Sloan* v. *Nixon*, 419 U.S. 958 (1974); *Prichard* v. *United States*, 339 U.S. 974 (1950). Congress enacted 28 U.S.C. 1252, the statute under which this Court's jurisdiction is invoked, because it recognized "[t]he importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress * * *." H.R. Rep. No. 212, 75th Cong., 1st Sess. 2 (1937). Because review by this Court is therefore "especially important in th[is] case[]" (*United States* v. *Will*, 449 U.S. 200, 217 (1980)), we believe that any doubts should be resolved against disqualification.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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